No. 04-480

Supreme Court, U.S.
FILED
NOV 8 - 2004
OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

METRO-GOLDWYN-MAYER STUDIOS, INC., *et al.*,
Petitioners,

v.

GROKSTER, LTD., *et al*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* FOR RECORDING ARTISTS' COALITION AND DON HENLEY, GLEN FREY, JOE WALSH, TIMOTHY B. SCHMIT ("THE EAGLES"), KIX BROOKS & RONNIE DUNN ("BROOKS & DUNN"), NATALIE MAINES, MARTIE MAQUIRE, EMILY ROBISON ("THE DIXIE CHICKS"), BONNIE RAITT, SHERYL CROW, PHIL VASSER, "MYA" HARRISON, KENNETH "BABYFACE" EDMONDS, BILL KREUTZMAN & MICKY HART (OF "THE GRATEFUL DEAD"), JIMMY BUFFETT, PATTY LOVELESS, STEVIE NICKS (OF "FLEETWOOD MAC"), AND GAVIN ROSSDALE (OF "BUSH") IN SUPPORT OF PETITIONERS

THOMAS G. CORCORAN, JR. *
JAY A. ROSENTHAL
BERLINER, CORCORAN & ROWE, L.L.P.
1101 17th Street, N.W.
Suite 1100
Washington, D.C. 20036
(202) 293-5555

* Counsel of Record

Attorneys for Recording Artists' Coalition

November 8, 2004

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20001

TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	ii
INTEREST OF *AMICUS CURIAE*	2
SUMMARY OF ARGUMENT	3
ARGUMENT	3
I. THERE IS A PRESSING NEED TO OVERRULE THE NINTH CIRCUITS' ERRONEOUS INTERPRETATION OF THE LAW OF CONTRIBUTORY COPYRIGHT INFRINGEMENT	3
CONCLUSION	8

TABLE OF AUTHORITIES

CASES Page

Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 380 F.3d 1154 (9th Cir. 2004)..... 3, 4, 7
Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd., 259 F.Supp. 2d 1029 (C.D.Cal.2003)..... 6
Sony Corp. of America v. Universal City Studios, Inc., 464 U.S. 417 (1984) 3, 4, 5, 7

STATUTES AND LEGISLATIVE MATERIALS

Privacy & Piracy: The Paradox of Illegal File Sharing on Peer-to-Peer Networks And the Impact of Technology on the Entertainment Industry: Hearing Before the Senate Committee on Governmental Affairs, 108th Cong. (September 30, 2003) (statement by Mitch Bainwol, CEO, RIAA)..... 5, 6
Statement of the Honorable Marybeth Peters, Register of Copyrights, Before the Senate Committee on the Judiciary, 108th Cong. (Sept. 9, 2003), http://www.copyright.gov/docs/regstat090903.html..... 6
Statement of the Honorable Marybeth Peters, Register of Copyrights, Before the Senate Committee on the Judiciary, 109th Cong. (July 22, 2004), http://www.copyright.gov/docs/ regstat072204.pdf..... 4, 7

MISCELLANEOUS ARTICLES

Lev Grossman, *It's All Free*, Time, (May 5, 2003)..... 5
Recording Industry Association of America 2003 Yearend Statistics 5

IN THE

Supreme Court of the United States

No. 04-480

METRO-GOLDWYN-MAYER STUDIOS, INC., *et al.*,
Petitioners,

v.

GROKSTER, LTD., *et al*,
Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF *AMICUS CURIAE* FOR RECORDING ARTISTS' COALITION AND DON HENLEY, GLEN FREY, JOE WALSH, TIMOTHY B. SCHMIT ("THE EAGLES"), KIX BROOKS & RONNIE DUNN ("BROOKS & DUNN"), NATALIE MAINES, MARTIE MAQUIRE, EMILY ROBISON ("THE DIXIE CHICKS"), BONNIE RAITT, SHERYL CROW, PHIL VASSER, "MYA" HARRISON, KENNETH "BABYFACE" EDMONDS, BILL KREUTZMAN & MICKY HART (OF "THE GRATEFUL DEAD"), JIMMY BUFFETT, PATTY LOVELESS, STEVIE NICKS (OF "FLEETWOOD MAC"), AND GAVIN ROSSDALE (OF "BUSH") IN SUPPORT OF PETITIONERS

BRIEF *AMICUS CURIAE*

The Recording Artists' Coalition ("RAC") and named individual recording artists respectfully submit this brief

amicus curiae in support of Petitioners Metro-Goldwyn-Mayer Studios, Inc., *et al.*

INTEREST OF *AMICUS CURIAE*

This brief *amicus curiae* in support of Petitioners is submitted by RAC and named individual recording artists pursuant to Rule 37 of the Rules of this Court. Founded in 1998, RAC is a non-profit public advocacy organization representing over 130 well-known featured recording artists, including some of those named on the cover of this brief. RAC is primarily concerned with political, legal, and business issues affecting the interests of recording artists.[1]

Individual recording artists are also joining RAC as *amici* in this brief. All have at one time or another been signed to a major label recording contract. The individual recording artists joining in this *Amicus* Brief are Don Henley, Glen Frey, Joe Walsh, Kix Brooks, Ronnie Dunn, Natalie Maines, Martie Maquire, Emily Robison, Bonnie Raitt, Sheryl Crow, Phil Vasser, "Mya" Harrison, Kenneth "Babyface" Edmonds, Bill Kreutzman, Micky Hart, Jimmy Buffet, Patty Loveless, Stevie Nicks, and Gavin Rossdale.

Amici have a strong interest in resolving the circuit court conflict presently existing as to whether the creation and distribution of unauthorized Internet peer-to-peer systems, which systems almost exclusively facilitate the distribution of copyrighted material in violation of the copyright laws, constitute contributory copyright infringement. More to the point, *amici* have an extremely strong interest in preserving and strengthening incentive for artists to create music by overturning the Ninth Circuit's ruling that Respondents did

[1] No entity other than *amici curiae* authored this brief either in whole or in part, and no person or entity other than *amici curiae* made a monetary contribution to the preparation or submission of this brief. All parties have consented to the filing of this brief, and all letters of consent are on file.

not engage in contributory copyright infringement by creating and distributing such peer-to-peer services.

Finally, *amici* want to debunk the myth that unauthorized peer-to-peer systems are—or plausibly can be—good for artists, and in particular musicians, the group RAC represents. As we show, these services severely hurt anyone who tries to make a living out of music.

SUMMARY OF ARGUMENT

When creating and distributing unauthorized peer-to-peer services that almost exclusively facilitate copyright infringement, the Respondents should be liable for contributory copyright infringement. The Ninth Circuit erred in extending the *Sony* doctrine, *Sony Corp. of America v. Universal City Studios, Inc.*, 464 U.S. 417 (1984), to insulate Respondents from liability. The Ninth Circuit was also incorrect in suggesting that Respondent's services help recording artists sell records. The long-term effect is clearly the opposite. Finally, the Ninth Circuit also ignored the mixed message sent to young people, *viz.*, Respondents are not engaged in copyright infringement when they provide peer-to-peer services, but young people are when they use the service.

ARGUMENT

I. THERE IS A PRESSING NEED TO OVERRULE THE NINTH CIRCUITS' ERRONEOUS INTERPRETATION OF THE LAW OF CONTRIBUTORY COPYRIGHT INFRINGEMENT.

The *Sony* doctrine should have no bearing on this case. The Ninth Circuit's extension of the doctrine has created a new rule permitting a defense to contributory copyright infringement without a showing of fair use by more than a small minority of end users. *See Metro-Goldwyn-Mayer Studios, Inc. v. Grokster Ltd.*, 380 F.3d 1154, 1160 (9th Cir. 2004); Pet.App. 8a.

In *Sony*, this Court concluded that the creators of the VCR (referred to there as the "VTR") were not liable for contributory copyright infringement. However, the *Sony* court first ruled that "time shifting," viewed then as the primary use of the VCR, *id.* at 419, 423, was a fair use by the end user. In the present case, there has been no such fair use determination. In fact, all parties, as well as the Ninth Circuit, acknowledge that the end users engage almost exclusively in copyright infringement. *Metro-Goldwyn-Mayer, supra*, 380 F.3d at 1160; Pet.App. 8a.

The Respondents' business model will not work unless the service offers the end user a means to acquire copyrighted music for free. By offering a means to acquire free music, the creator of the service guarantees high traffic, thus ensuring high advertising rates and millions of dollars in revenue. Marybeth Peters, the Register of Copyrights, in testimony before the Senate Judiciary Committee, called this a ". . . division of labor strategy that enlists millions of consumers to become distributors of infringing copies, thereby attracting more users and advertisers who generate revenue for these companies but which is designed to leave the proprietor without legal liability."[2] Overwhelmingly, what Respondents have to sell is copyright infringement. On this record, it is undisputed that the percentage exceeds 90%. *See* Petition, p. 4. By way of contrast, in *Sony*, the district court found that roughly 75% of the VCR end uses consisted of "time-shifting," a use found to be a fair use. The other 25% of uses, as we read the opinion, were not contended to constitute a violation of copyright. *Id.* at 422-425.

Underlying the *Sony* court's ruling that "time shifting" is "fair use" was the conclusion that the copyright owners

[2] Statement of the Honorable Marybeth Peters, Register of Copyrights, Before the Senate Committee on the Judiciary, 109th Cong. (July 22, 2004), p. 3.

suffered no economic harm. The Court was presented with overwhelming evidence that the TV producers were not losing money as a result of the manufacturing and distribution of the VCR. *Id.* at 444-446.

The contrast with the present case could not be more stark. Since the introduction of the peer-to-peer systems, the record industry has been in a severe depression. As Mitch Bainwol, Chairman of the Recording Industry Association of America, testified to the Senate:

> In the past three years, shipments of recorded music in the United States have fallen by an astounding 26 percent, from 1.16 billion units in 1999 to 860 million units in 2002. And worldwide, the recording industry has shrunk from a $40 billion industry in 2000 down to a $32 billion industry in 2002. Hit records—which are critical to the long-term health of the music industry and enable investment in new artists and new music—have suffered most dramatically. In 2000, the ten top-selling albums in the United States sold a total of 60 million units. In 2001, that number dropped to 40 million. Last year, it totaled just 34 million.
>
> The root cause for this drastic decline in record sales is the astronomical rate of music piracy on the Internet. Computer users illegally download more than 2.6 billion copyrighted files (mostly recordings) every month. At any given moment, well over five million users are online offering well over 1 billion files for copying through various peer-to-peer networks.[3]

[3] *The Paradox of Illegal File Sharing on Peer-to-Peer Networks and the Impact of Technology on the Entertainment Industry*, Testimony of Mitch Bainwol before the Senate Committee on Governmental Affairs, 108th Cong. (September 30, 2003), p 2. http://www.riaa.com/news/newsletter/093003_2a.asp. *See also*, Lev Grossman, Technology: *It's All Free*, Time Magazine (Canadian Edition)(May 25, 2003), p. 1; RIAA 2003 Yearend Statistics, http://www.riaa.com/news/newsletter/pdf/2003yearEnd.pdf .

The Ninth Circuit's decision opens the flood gates for computer software developers to create and market peer-to-peer services with impunity, which, with full knowledge and intent,[4] provide the means and opportunity for millions of primary infringers, typically young people, to engage in what may well be the most extensive and damaging reign of copyright infringement in history.[5]

Not only have sales of records plummeted. *Amici* represent to the Court that record companies have fired thousands of employees and have significantly cut back on investment and expansion plans. Experimentation—the seed of most intellectual progress—has largely been abandoned. Only low-risk music projects see the light of day. Many artists have been dropped by major labels, and for those artists remaining, promotion and tour support money has been greatly cur ailed, if not eliminated entirely. Artists who would have been signed in better times are being ignored. *Amici* believe that the principal reason for this catastrophic loss is the proliferation of unauthorized peer-to-peer services.[6]

As Register Peters stated it in her testimony before the Senate: "These facts make the comparison to Sony remarkably inapt. In my view, if the VCR had been designed in such

---

[4] Statement of the Honorable Mary Beth Peters, Register of Copyrights, Before the Senate Committee on the Judiciary, 108th Cong. (September 9, 2003)("it is apparent that an overwhelming number of their customers are using it for . . . copying and distributing copyrighted works"), p. 1; Pet. App. 62a. *See Metro Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 259 F.Supp. 2d 1029, 1046 (C.D.Cal. 2003) ("The Courts is not blind to the possibility that defendants may have intentionally structured their businesses to avoid secondary liability for copyright infringement while benefiting financially from the illicit draw of their wares); Pet.App. 54a.

[5] *See* Peters, note 4, *supra*, p. 2 ("such infringement is occurring on a mind-boggling scale."); Pet. App. 66a. *See also*, Bainvoll, quoted *supra*.

[6] *See* Bainwol, *supra*.

a way that when a consumer merely turned it on, copies of all of the programs he recorded with it were immediately made available to every other VCR in the world, there is no doubt the Sony decision would have gone the other way."[7] The technology of copying has changed since the Court's decision in *Sony*. The distinguishing points, referred to by the Register, *supra*, are the unlimited extent and almost instantaneous rate of spread now provided by peer-to-peer services. Copying from a VCR is slow and quality declines with repetition.

The Register also states: "If the Sony precedent continues to be an impediment to obtaining effective relief against those who profit by providing the means to engage in mass infringement, it should be replaced by a more flexible rule that is more meaningful in the technological age, but that still vindicates the Court's goal to balance effective and not merely symbolic protection of copyright with the rights of others to engage in substantially unrelated areas of commerce."[8]

One of the arguments advanced by Respondents and their supporters is that unauthorized peer-to-peer services actually help recording artists. The Ninth Circuit seemed to accept this argument relying on the example of Wilco. Wilco was a struggling rock act that lost its major label deal and then signed another major label contract ostensibly because it had successfully offered its music for free over the usually unauthorized peer-to-peer systems. *Metro-Goldwyn-Mayer, supra*, 380 F.3d at 1161; Pet.App. 11a.

While free distribution may have helped Wilco in the short run, by enabling it to obtain a new contract, Wilco's long term prospects will surely be poor if it cannot sell its music in the future because Respondents will distribute it for free, with

---

[7] *See* Peters, note 2, *supra*, p. 14.

[8] *Id.*, p.3.

or without Wilco's authorization. That is, the value of Wilco's offering its music for free on the Internet depends on Wilco being able to prevent free distribution of its music in the future. As shown above, the music industry as a whole has suffered a catastrophic loss since the introduction of peer-to-peer services. That loss cannot plausibly be remedied by following the example of Wilco.

Finally, by allowing the creators of these systems to escape liability, the Ninth Circuit is sending an insidious mixed message to the end users, typically young people. When a 14 year old reads a story proclaiming that Grokster is legal, how can that 14 year old be expected to understand that what he does should be illegal, when he knows that Grokster is immensely profitable precisely because it facilitates his supposed illegality? Providing safe harbor to the creators of these systems, we respectfully submit, is like legalizing the manufacture and sale of drugs, but not the use of drugs.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

THOMAS G. CORCORAN, JR. *
JAY A. ROSENTHAL
BERLINER, CORCORAN & ROWE, L.L.P.
1101 17th Street, N.W.
Suite 1100
Washington, D.C. 20036
(202) 293-5555

* Counsel of Record

Attorneys for Recording Artists' Coalition

November 8, 2004